Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Verizon Petition for Forbearance,	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local	)	
Exchange Carriers	)	

OPPOSITION OF COVAD COMMUNICATIONS TO VERIZON PETITION REQUESTING FORBEARANCE FROM SECTION 271

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INTRODUCTION

Covad Communications, by its attorneys, herewith respectfully submits its opposition to the petition of the Verizon Telephone Companies requesting forbearance from the application of section 271 unbundling obligations to broadband functionalities for which the Commission made findings of competitor non-impairment in its *Triennial Review Order*.[1] Verizon's current petition withdraws its earlier request for forbearance with respect to any "narrowband elements" that do not have to be unbundled under section 251, and limits its forbearance request to so-called "broadband elements."[2]

Verizon's revised petition suffers from many of the same defects that plagued its earlier petition for forbearance. Verizon's revised petition still rests on a fundamentally flawed interpretation of the Communications Act, seeking to have the Commission employ forbearance authority that it simply does not have. Moreover, Verizon's petition suffers from the critical flaw that it is impermissibly vague – neither parties nor the Commission can know exactly which network elements would continue to be and which would no longer be unbundled under section 271 of the Act if Verizon's petition were granted.

In light of these serious flaws, the Commission should immediately reject Verizon's revised petition for forbearance. In any event, the Commission should require Verizon to make clear that any regulatory forbearance granted pursuant to Verizon's revised petition would not apply to any form of "local loop transmission" over legacy copper loop facilities.

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[1] *See Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance from Application of Section 271*, Public Notice, CC Docket No. 01-338, FCC 03-263 (rel. Oct. 27, 2003).

[2] *See id.* at 2.

ARGUMENT

Covad is the leading nationwide provider of broadband connectivity using digital subscriber line (DSL) technology. Covad's nationwide facilities-based broadband network reaches nearly 45% of the nation's homes and businesses. As a facilities-based provider, Covad relies on ILECs to provide unbundled transmission facilities (loops and interoffice transport) and the operations support systems (OSS) necessary to facilitate ordering and provisioning of such facilities. In addition, in order to connect customers to its network, Covad is collocated in hundreds of central offices throughout the nation. Furthermore, as a facilities-based provider of broadband services in both the mass market and enterprise markets, Covad is uniquely affected by Verizon's request for further deregulation of last-mile transmission facilities used to provide broadband services.

1. The Commission Has Spoken Unmistakably On the Relationship Between Section 251 and Section 271 Unbundling Obligations.

The Commission's *Triennial Review Order* explicitly analyzes all loop types, including loops used to deliver broadband telecommunications services, in its review of local loop unbundling obligations.[3] Clearly these facilities constitute "local loop transmission" within the meaning of section 271 checklist item #4.[4] In fact, the Commission's *Triennial Review Order* has already conclusively addressed the issue of the overlap and interplay between section 251 and section 271 unbundling obligations:

> [W]e continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.[5]

[3] *See Triennial Review Order* at paras. 273-284 and 285-297.

[4] 47 U.S.C. § 271(c)(2)(B)(iv) (Section 271 Checklist Item #4).

[5] *See Triennial Review Order*, para. 653.

> Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.[6]

Thus, there is no question that, regardless of the Commission's analysis of competitor impairment and corresponding unbundling obligations under section 251 for *incumbent LECs*, a Bell Company retains an independent statutory obligation under section 271 of the Act to provide competitors with unbundled access to the network elements listed in the section 271 checklist.[7] Moreover, there is no question that these obligations include the provision of unbundled access to loops under checklist item #4:

> Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning section 251.[8]

2. The Commission Lacks the Authority to Eliminate Section 271 Checklist Unbundling Obligations, through Forbearance or Any Other Means.

Verizon urges the simplistic proposition that section 251 and section 271 should be read and applied identically, in spite of the clear statutory language of both provisions. Section 251 sets forth unbundling obligations that apply to all incumbent LECs, while section 271's separate unbundling obligations apply specifically to the regional Bell Companies. When it adopted the separate unbundling obligations in section 271, Congress acted in response to the specific harms created by the RBOCs' exercise of market power in the provision of interLATA telecommunications. Accordingly, Congress cannot have intended to limit the separate unbundling obligations of section

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[6] *See Triennial Review Order*, para. 655.

[7] *See* 47 U.S.C. § 271(c)(2)(B).

[8] *See Triennial Review Order*, para. 654.

271 in simple concert with the Commission's contraction of the list of section 251 UNEs pursuant to its implementation of the impairment standard in section 251(d)(2).

The structure of the section 271 checklist confirms this Congressional intent. In checklist item #2, Congress chose to specifically incorporate the section 251(c)(3) unbundling obligations implemented through the Commission's rulemaking applying the section 251(d)(2) impairment standard – as a separate checklist item. If Congress had intended the entire section 271 checklist to be identical to the separate unbundling obligations of section 251, it could have simply stopped with checklist item #2. Instead, Congress chose to include a full complement of 14 checklist items in section 271. In other words, Congress intended the BOCs to continue to provide access to the facilities in the remainder of the checklist, *even if* the Commission were to find a lack of impairment under section 251(d)(2). Thus, Congress could not have simply intended the remaining checklist items to track the separate section 251(c)(3) unbundling requirements it chose to specifically incorporate in checklist item #2.

Furthermore, the language of section 271 is clear that Congress specifically forbade the authority to the Commission to alter the section 271 checklist – whether by forbearance or any other means. Section 271(d)(4) expressly states that "[t]he Commission *may not*, by rule *or otherwise*, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)."[9] Thus, in contrast to its rulemaking authority to implement the statutory impairment standard in section 251(d)(2), and thereby expand or limit the list of network elements subject to section 251(c)(3)'s unbundling obligations, the Commission has no authority, whether through

[9] 47 U.S.C. § 271(d)(4) (emphasis added).

forbearance or any other means, to limit Congress' mandatory list of unbundling obligations for the regional Bell companies in section 271. The Commission simply lacks the authority to use its forbearance powers in the manner Verizon suggests. Thus, whatever powers the Commission has to forbear from the requirements of section 271 cannot include the power to "limit or extend the terms used in the competitive checklist."[10]

3. Verizon Fails to Show That Section 271 Has Been "Fully Implemented," As Required Under Section 10(d) of the Act.

In addition, Verizon's request practically ignores the separate requirement of section 10(d) of the Act that the Commission may *not* forbear from applying the requirements of section 271 until that section has been "fully implemented." Verizon's construction of the statute pays lip service to this requirement, but fails to render it meaningful in any sense. According to Verizon, the requirement of section 10(d) that section 271 be "fully implemented" is satisfied as soon as an RBOC gains section 271 interLATA authorization in a particular state.[11]

According to this logic, as soon as a BOC meets the market-opening conditions of section 271, section 10(d) would allow the Commission to let the BOC backslide on its section 271 compliance. Thus, according to Verizon's view of the world, in order to enter interLATA markets, a BOC would simply have to demonstrate its compliance with the checklist provisions of section 271 for one brief, shining moment. The Commission's actual conduct of section 271 reviews and its post-entry enforcement certainly belie Verizon's view of the statute. Indeed, the statutory scheme upon which RBOC long

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[10] *Id.*

[11] *See* Verizon Petition at 3-4.

distance entry is premised requires the RBOC to facilitate competitive entry by providing, among other things, the unbundled network elements delineated in the competitive checklist. It is therefore impossible to credit Verizon's argument that, once it enters the long distance market in a state by proving that competition is viable through the unbundling scheme set forth in the 271 checklist, the BOC is free to simply end that mode of entry by barring competitors from using the same unbundled network elements upon which entry into the long distance market was conditioned.

Verizon's interpretation of section 10(d)'s "fully implemented" requirement turns the statute on its head, by construing this requirement to include only one of section 271's many requirements – namely, that the RBOC demonstrate its provision of unbundled, non-discriminatory access to items set forth in the 271 competitive checklist at the time of its making a section 271 application, in accordance with section 271(d)(3)(A)(i). According to Verizon, such a construction makes sense because the phrase "fully implemented" is used both in section 10(d) and in section 271(d)(3)(A)(i); thus, according to Verizon, they must mean the same thing.[12] Of course, Verizon ignores the two very different contexts in which these two words appear in the statute in order to arrive at its bizarre construction. Section 10(d) requires not simply that the competitive checklist be "fully implemented" at the time of an RBOC's section 271 application (as section 271(d)(3)(A)(i) does), but rather that the entirety of section 271 be "fully implemented" before the Commission can exercise forbearance authority.

Thus, at a minimum, an RBOC must also implement the remaining obligations of section 271 before the Commission can exercise any forbearance of the requirements of

[12] *See* Verizon Petition at 3-4 and 13.

section 271. Critically, these other requirements include continuing obligations. Section 271(d)(6), for example, establishes that a BOC must *remain* in compliance with the checklist after it has gained interLATA entry. Congress would not have included this section in the Act if it had intended the requirements of the checklist to disappear as soon as a BOC had gained in-region authority. Thus, the "fully implemented" requirement cannot mean that as soon as an RBOC meets the "fully implemented" requirement of section 271(d)(3)(A)(i) at the time of making a 271 application, it also *ipso facto* meets the "fully implemented" requirement of section 10(d), which applies to the entirety of section 271's initial and continuing obligations. Certainly, the "fully implemented" requirement cannot mean that forbearance authority kicks in the instant a BOC gains section 271 authority.

The phrase "fully implemented" in section 10(d) could only mean that the provision has fully and finally achieved all of its purposes – i.e., the checklist could not be deemed "fully implemented" until Congress has determined that there is no longer any continuing need for retention of the market-opening provisions set forth in section 271 of the Act. Certainly, that is not the case today, nor does Verizon even attempt to make such a showing.

4. Verizon Fails to Make the Requisite Showing for Forbearance

Apart from its deficiencies discussed above, Verizon's petition suffers from the additional deficiency that it fails to make the requisite baseline showing ordinarily required for the Commission to forbear from applying any section of the Act. Specifically, in order to gain forbearance, Verizon must show (i) that enforcement of its checklist obligations is not necessary to ensure that the "charges, practices, classifications

or regulations" relating to services over the facilities at issue are just, reasonable and non-discriminatory; (ii) that enforcement of its checklist obligations is not necessary for the protection of consumers; and (iii) that forbearance from its checklist obligations would be in the public interest, including a determination of whether such forbearance will promote "competitive market conditions."[13] In fact, Verizon's petition for forbearance satisfies none of these requirements.

Now more than ever, enforcement of RBOC section 271 unbundling obligations is necessary to ensure that the prices of broadband telecommunications services delivered over RBOC local loops facilities are just, reasonable and non-discriminatory. Without such unbundling, the RBOCs will be left free to remonopolize the delivery of broadband telecommunications services by leveraging their control over the local loop network, including their inherent advantages over access to legacy facilities including rights of way, ducts, conduits, and transmission facilities. Verizon can hardly make the case that consumers would be better off with fewer choices for their broadband services, which is exactly the outcome that Verizon's petition would produce.

Furthermore, it is particularly instructive that the third prong of Congress' forbearance standard explicitly requires the Commission, pursuant to section 10(b), to determine whether or not forbearance promotes competition in its analysis of whether forbearance would be in the public interest.[14] This provision reflects Congress' specific intent that the Commission use its forbearance authority to *promote* market competition. Verizon's petition, by contrast, would have the Commission use its forbearance authority to thwart competition for broadband services. In light of Congress' specific instruction to

[13] *See* 47 U.S.C. § 160(a) and (b).

[14] *See* 47 U.S.C. § 160(a)(3) and (b).

the Commission in section 10(b), Verizon's forbearance petition can hardly be said to be in the public interest.

Finally, in examining whether Verizon has made the requisite showing for forbearance, the Commission must look through Verizon's hyperbole surrounding the costs it would incur to provide access to its network facilities for the provision of broadband services. According to Verizon, requiring such access under section 271 would "require a costly *redesign* of the network" to enable competitor access.[15] In fact, nothing could be further from the truth. As Verizon's PARTS Tariff made clear, Verizon *already* designs its hybrid fiber-copper loop facilities to allow competitor bitstream access at the CO level, through OCD port interconnection.[16] Thus, no "costly redesign" of Verizon's network would be necessary to enable the competitor access that Verizon here seeks to evade.

5. In Any Event, the Commission Should Require Verizon to Make Clear That The Relief It Seeks Does Not Apply to Any Legacy Copper Facilities

Perhaps the most serious flaw in Verizon's forbearance petition is its inscrutable vagueness – from reading Verizon's petition, neither parties nor the Commission can know exactly which network facilities and what types of access to these facilities Verizon seeks to exclude from unbundling under section 271. Verizon's petition states that it seeks forbearance with respect to "broadband elements," because such forbearance is critical to Verizon's deployment of "next generation networks."[17] Verizon indicates that

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[15] *See* Verizon Petition at 10.

[16] *See* Revisions to Section 16.9 of Tariff F.C.C. No. 1 filed by the Verizon Telephone Companies, Tn. 232 on August 9, 2002, with an effective date of August 24, 2002; and Revisions to Section 17.4 and Section 31.17.4 of Tariff F.C.C. No. 11 filed by the Verizon Telephone Companies, Tn. 232 on August 9, 2002, with an effective date of August 24, 2002 (*Verizon PARTS Tariff*).

[17] *See* Verizon Petition, Cover Letter of Susanne Guyer, Verizon, to Chairman Powell and Commissioners Abernathy, Martin, Copps and Adelstein, FCC, at 1.

"broadband elements" includes at least "fiber-to-the-premises loops, the packet-switched features, functions and capabilities of hybrid loops, and packet switching."[18] Verizon's request, however, is not explicitly limited solely to these items. Instead, Verizon's request for forbearance from applying section 271 unbundling obligations to "broadband elements" could mean whatever Verizon subsequently says it does – leaving competitors subject to Verizon's whim in determining where section 271 unbundling obligations continue to apply.

Although, as discussed above, Covad believes that Verizon's forbearance petition is fundamentally flawed and rests on the Commission's exercise of statutory authority it simply does not have, the Commission must not, in any event, grant Verizon's petition in its current form. Rather, the Commission should require Verizon to narrow and clarify its request to include solely greenfield, mass market fiber-to-the-home loops. Verizon must not be given a form of carte blanche forbearance with respect to so-called "broadband elements," and then subsequently use that carte blanche to claim it has also received forbearance from section 271 unbundling obligations with respect to TDM enterprise loops used to provide broadband services, copper loops used to provide broadband services, or other loop elements it sweeps under the vague umbrella of "broadband elements." Furthermore, it is only for greenfield, mass market fiber-to-the-home loops that the Bell companies can point with any kind of facial reasonableness to regulatory relief as a means of spurring Bell company deployment incentives.[19]

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[18] *See id.*

[19] *See, e.g.,* BellSouth Petition for Clarification and/or Partial Reconsideration in CC Docket No. 01-338, filed Oct. 2, 2003 (seeking regulatory relief, including section 271 forbearance, for fiber-to-the-curb loops) (*BellSouth FTTC Petition*).

Furthermore, Verizon should be required to make clear that no aspect of its forbearance request would affect the unbundling of any type of "local loop transmission" over legacy copper loop facilities. Indeed, the core rationales Verizon cites of promoting section 706 "next-generation network" deployment incentives do not even apply to copper loop facilities, nor did the Commission include such incentives in its analysis of competitor impairment with respect to any copper loop types in the *Triennial Review Order*. Thus, the premise of Verizon's forbearance petition fails to even apply to copper loop facilities, whether or not they are used by competitors to provide broadband services. Accordingly, before the Commission can proceed any further, Verizon must be required to make clear that no aspect of its forbearance petition would affect the unbundling of any type of "local loop transmission" over copper loop facilities, and that such unbundling would continue to remain available under the section 271 checklist.

CONCLUSION

As discussed above, Covad continues to believe that Verizon's revised forbearance petition suffers from many of the same flaws as its earlier petition for forbearance from the unbundling obligations of section 271. Verizon invokes statutory authority the Commission simply does not have, and fails to make the showing required in order to obtain forbearance – including the much stricter showing required for section 271 forbearance that section 271 has been "fully implemented."

In any event, as it currently stands, Verizon's petition is inscrutably vague, and allows it far too much latitude to claim after the fact that facilities have or have not been deregulated at its whim. Accordingly, before proceeding any further, the Commission should require Verizon to narrow and clarify its forbearance request to greenfield, mass market fiber-to-the-home loops, and to make clear that no aspect of Verizon's forbearance request would in any way affect its ongoing obligations to unbundle any type of "local loop transmission" over copper loop facilities.

Respectfully submitted,

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